FILE COPY

FILED
JUL 6 1948
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 72

THE TEXAS & PACIFIC RAILWAY COMPANY,
Petitioner,

—against—

JESSIE A. KILPATRICK,
Respondent.

No. 73

THE TEXAS & PACIFIC RAILWAY COMPANY,
Petitioner,

—against—

L. M. PARKER,
Respondent.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI

GERALD F. FINLEY, ARNOLD B. ELKIND
of New York City, N. Y.
and WILLIAM H. DEPARCQ
of Minneapolis, Minnesota
Attorneys for Respondents
545 Fifth Avenue
New York 17, N. Y.

INDEX

	PAGE
Opinions below	1
Jurisdiction	2
Questions Presented	3
Statute Involved	4
Statement	4
Argument	6
Conclusion	8

CITATIONS

Baltimore & Ohio R. R. Co. v. Kepner, 314 U. S. 44	7
Frene v. Louisville Cement Co., 134 F. (2d) 311 (1943)	6
General Trading Co. v. State Tax Commission of Iowa and allied cases, 322 U. S. 327, 335, 340, 354 (1944), 354	6
Green v. The Chicago, Burlington & Quincy R. R. Co., 205 U. S. 530 (1907)	6
Gulf Oil Corporation v. Gilbert, 330 U. S. 501, 503	7, 8
International Harvester Co. v. Kentucky, 234 U. S. 579 (1914)	6
International Shoe Co. v. State of Washington, 326 U. S. 310 (1945)	6, 8

PAGE

Miles v. Illinois Central R. R. Co., 315 U. S. 698 7

Philadelphia & Reading Railway Company v. McKibbin, 243 U. S. 264 (1917) 6
Pomeroy v. Hocking Valley Rwy. Co., 218 N. Y. 530 (1916) 7

Toledo Railways & Light Co. v. Hill, 244 U. S. 49 (1917) 7

United States v. Socophony Corp. of America, U. S. (decided April 26, 1948) 6, 7, 8

OTHER AUTHORITY

45 U. S. C. A. Section 56 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No.

THE TEXAS & PACIFIC RAILWAY COMPANY,

Petitioner,

—against—

JESSIE A. KILPATRICK,

Respondent.

No.

THE TEXAS & PACIFIC RAILWAY COMPANY,

Petitioner,

—against—

L. M. PARKER,

Respondent.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI

Opinions Below

There are three reported opinions. The opinion in which the District Judge vacated notices of dismissal filed by the plaintiffs prior to the interposition of an answer, is 72 F. Supp. 632.

The opinion in which the District Court refused to grant the plaintiffs the right to take discovery depositions in support of jurisdiction and which held that the defendant was not doing business in the Southern District of New

York on the basis of the affidavits which it had interposed, is 72 F. Supp. 635.

The opinion of the Circuit Court, which did not go into the question of whether the plaintiffs were entitled to take depositions in support of jurisdiction but held that the defendant was doing business on the basis of the affidavits which defendant interposed, is 166 F. (2d) 788. By this opinion the Circuit Court also held that the plaintiffs had properly dismissed the actions.

Jurisdiction

These actions were commenced in the Southern District of New York by employees of the defendant. They were suing to recover damages for personal injuries and brought their suits pursuant to the Federal Employers' Liability Act.

The defendant moved to dismiss the complaints upon grounds gathering their vitality from the contention that the defendant was not doing business in the Southern District of New York at the time of the commencement of the action (f. 66).

The plaintiffs thereupon moved for leave to take the depositions of various named employees of the defendant in the Southern District of New York and of certain other agencies and institutions for the purpose of obtaining a primary record of the activities of the defendant in the Southern District of New York (ff. 103 to 120).

These motions came on to be heard simultaneously together with an application by the plaintiffs for an adjournment of the defendant's motion until after the plaintiffs' motion to take depositions had been decided (f. 122). After oral argument, but before final submission, plaintiffs filed dismissals of the actions (f. 128). The defendant moved

to vacate the notices of dismissal and the Court vacated the notices of dismissal in the opinion reported at 72 F. Supp. 632.

Over four months after the argument of the motion the defendant filed the affidavits which allegedly set forth the record of the defendant's activities (ff. 205 to 401). In a single opinion reported at 72 F. Supp. 635 the district court denied plaintiffs' motion to take depositions and dismissed the actions upon the ground that the defendant was not doing business in the Southern District of New York.

On appeal to the Circuit Court in the Second Circuit, the Court held that the affidavits which the defendant had submitted (ff. 205 to 401) set forth sufficient corporate activities in the Southern District of New York to constitute doing business, and held that the vacating of the notices of dismissal by the District Court was in error and that the actions were properly dismissed by the plaintiffs.

Preliminarily, therefore, there is a question as to whether or not the record upon which this Court is called upon to act is now moot.

Questions Presented

PRELIMINARY QUESTION:

Were the actions in the District Court properly dismissed by the plaintiff and, if so, is this Court being asked to pass upon a moot record?

1. Did the District Court acquire *in personam* jurisdiction over the defendant upon service of process?

2. Can the doctrine of *forum non conveniens* be invoked to defeat the choice of venue under the Federal Employers' Liability Act?

Statute Involved

The statute involved is 45 U. S. C. A., Section 56, the relevant portion of which reads as follows:

> "Under this chapter an action may be brought in a District Court of the United States in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action."

Statement

If the Court finds that the record should not be treated as moot, then the subject matter which the Court is asked to review is whether or not the carrying on of the following activities by the defendant in the Southern District of New York is sufficient to constitute doing business so as to support service of process:

1. The maintenance of a regular office at 233 Broadway, New York City (f. 82).

2. The employment there of an Eastern Passenger Agent, a District Manager in Charge of Perishable Freight Service, a Traveling Passenger Agent, two Commercial Agents, a Chief Clerk, and a stenographer (f. 234).

3. A continuous business of solicitation of freight and passenger business (ff. 246, 252, 258).

4. The facilitation of the procurement of tickets (f. 246).

5. The checking of records of freight shipments (f. 264).

6. The reporting of freight orders (f. 264).

7. Correspondence (f. 264).

8. J. P. Morgan & Co., Incorporated, at 23 Wall Street, New York City, carries on the following fiscal activities for the defendant:

   a) Transfers of the defendant's stock (f. 290).

   b) The payment of dividends on common stock (f. 290). (There is only 1 share of preferred stock held by Missouri-Pacific.)

   c) Payment of interest on bond issues (ff. 288, 289).

   d) Payment of interest and principal on equipment trust certificates (f. 289).

9. Other New York financial institutions are the trustee owners of various equipment and other corporate properties pledged as collateral in connection with long term borrowing by the defendant (ff. 295, 306).

ARGUMENT

It may be questioned whether the authority of *Green* v. *The Chicago, Burlington & Quincy R. R. Co.*, 205 U. S. 530 (1907) has ever been expressly overruled. It is not the controlling authority in this case, however, since the activities listed far exceed the type of simple solicitation in the *Green* case.

The *Green* case (which did not arise under the Federal Employers' Liability Act) was described as an extreme case in *International Harvester Co.* v. *Kentucky*, 234 U. S. 579 (1914). In *Frene* v. *Louisville Cement Co.*, 134 F. (2d) 311 (1943) the Court pointed out that the concept originated when it was thought that nothing less than the concluding contracts constitute doing business by a foreign corporation, "an idea now well exploded".

> *General Trading Co.* v. *State Tax Commission of Iowa and allied cases*, 322 U. S. 327, 335, 340, 354 (1944), 354;
> *United States* v. *Socophony Corp. of America*, U. S. (decided April 26, 1948, and not yet officially reported).

Insofar as constitutionality is concerned, *International Shoe Co.* v. *State of Washington*, 326 U. S. 310 (1945) is authority that a continuous, regular and systematic solicitation of orders is sufficient to support jurisdiction *in personam*.

Philadelphia & Reading Railway Company v. *McKibbin*, 243 U. S. 264 (1917) strongly relied upon by the petitioner is clearly distinguishable on its facts. The reasoning of the opinion was singled out for criticism in *United States* v. *Socophony* (*supra*).

However, the activities carried on by and on behalf of this defendant actually removed the question of whether or not the defendant was doing business from the penumbra and borderline of the cases heretofore referred to. This is so by virtue of the important corporate activities carried on on behalf of the defendant by various fiscal agents in connection with the transferals of stock, the payment of dividends, the payment of interest and principal on bond issues and the like (ff. 290, 288, 289, 295, 306). Compare *Toledo Railways & Light Co.* v. *Hill*, 244 U. S. 49 (1917), where no activity was carried on and plaintiff relied merely on the fact that an office had been authorized for the payment of interest and principal on bonds and coupons, with *Pomeroy* v. *Hocking Valley Rwy. Co.*, 218 N. Y. 530 (1916) and *United States* v. *Socophony Corp. of America* (*supra*).

It is well decided that once a defendant in a Federal Employers' Liability Act case is found to be doing business the choice of forum cannot be defeated on grounds of convenience, whether specifically denominated *forum non conveniens* or otherwise. *Baltimore & Ohio R. R. Co.* v. *Kepner*, 314 U. S. 44; *Miles* v. *Illinois Central R. R. Co.*, 315 U. S. 698; *Gulf Oil Corporation* v. *Gilbert*, 330 U. S. 501, 503.

The opinion of the Circuit Court is in conformity with the decisions of the Supreme Court and there are not believed to be contrary holdings by other Circuit Courts. The opinion of the Circuit Court represents merely a clarification and restatement of well settled principles not warranting a review by this Court.

CONCLUSION

The record upon which this Court is asked to act is moot. The opinion of the Circuit Court merely represents a restatement of what the law has always been; its sole distinction is that these well established principles are for the first time viewed through the perspective furnished by this Court in *International Shoe Co.* v. *State of Washington, supra,* and *Gulf Oil Corporation* v. *Gilbert, supra.* The reasoning of the Circuit Court has already been substantially confirmed in *United States* v. *Socophony Corp. of America.* There are no conflicting decisions in this Court or any other Circuit Court, and it is respectfully urged that the petition for writs of certiorari be denied.

Respectfully submitted,

GERALD F. FINLEY, ARNOLD B. ELKIND
and WILLIAM H. DEPARCQ,
Attorneys for Respondents.